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Abstract: The paper is concerned with the Hartian idea that the justification of law's normativity can be traced back to the exquisite social fact, viz. special kind of social convention. After discussing the view that the rule of recognition is a coordinative convention A. Marmor's idea of constitutive convention is introduced. Relying on J. Dickson's brilliant enquiry I finally argue that this latter idea is deprieved of any explanatory power, which was pressuposed by H.L.A. Hart when he himself reffered to the conventional rule of recognition as social fact having full normative significance.
Keywords: conventionalism, rule of reconition, coordination convention, constitutive convention.

Law is usually, by practicioners, as well as by laymen, described as trivially conventional. The platitude, to which such assumption of conventional nature of law refers, is not entirely clear. To stress the conventional character of law, if it is supposed to have any deeper sense, is to say that law has "conventional foundations". However, many important philosophical problems arise, when a closer look at the notion in question is taken. If we cannot simply presuppose the existence, validity and normativity of legal rules, as H. Kelsen did, we may try to find the ultimate source of legality in some kind of a conventional, social fact. This problem may be called "the Conventionality Puzzle", analogously to the problem of general normativity of law, recently called by S. Shapiro "the Possibility Puzzle"[1].

The idea of convention, considered as ultimate justification of the existence of many social facts (including language) has been analyzed and criticized for a very long time. The first straightforward important response to the classical conventionalism (defended by R. Carnap) was presented by W.V. Quine (and also by N. Goodman and L. Wittgenstein), who had deprived the idea of convention of such an ultimate, constructive function. They claimed that a convention cannot be identified with any kind of „ultimate decision". If there is a decision to be made, there must always be a preliminary criterion allowing to circumscribe sorts of matters which the decision is to be applied to. Such identification would be nothing but a stratagem, as far as the first decision under deliberation must be premised by another one. And so on... Therefore,

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[1] Cf. S. Shapiro, *Planning Agency and the Law* [w:] S. Bertea & G. Pavlacos (red.), *New Essays on the Normativity of Law*, Oxford 2011.

language, as well as law, cannot be ultimately justified by any conventional fact (decision or agreement), because, as Quine noted, such fact is not only merely unhistorical, but unthinkable[2]. This idea is expressed in his famous metaphor:

"The lore of our fathers is a fabric of sentences. ... It is a pale gray lore, black with fact and white with convention. But I have found no substantial reasons for concluding that there are any quite black threads in it, or any white ones"[3]

The Quinean conclusion is that we can talk about 'conventionalism' like of having in mind the idea of white color, but we cannot speak of 'pure conventions' and 'pure facts' alone, as there are no quite white or quite black threads in the real world (the description of which is the fabric of sentences). The notion of 'convention' itself is no more of any practical use, since the conventions of language (and, all the more, social – moral and legal conventions – made by using some minimum of language to state them) could not possibly have originated by any kind of agreement (implicit or explicit, in each case based on arbitrary decision), because some of them would have been needed to provide the rudimentary language in which the first agreement was made[4].The Wittgensteinenian idea of *forms of life* has very much in common with that anticonventionalist conclusion.

Without undermining the idea of anticonventionalist foundations of language, some philosophers wanted to show anyway that deliberating over conventionality of language is not only a matter speaking over mere regularities our use of language conforms to, but has some deeper sense, abstracted from our common use of language, and thus save the primordial, "conventionalist" intuition.

The revival of that basic intuition was initiated by D. Lewis' *Convention*, where he tried to analyze common, established concept of convention, so that every reader would recognize that it explains what she or he must have in mind when she or he says that language – like many other activities – is governed by conventions[5]. Lewis treats convention as an important phenomenon, which creates languages and other social institutions without any explicit act or event of agreeing and in a way that is generally difficult to describe. Roughly speaking, Lewis described a convention as a solution to a coordination problem (which arise in non-zero sum coordination

[2] „What is convention when there can be no thought of convening?" (D. Lewis, *Convention: A Philosophical Study*, Cambridge, Mass. 1969. p. : xi).
[3] W.V. Quine, *Carnap...*, p. 374.
[4] D. Lewis, *Convention...*, p. 2.
[5] D. Lewis, *Convention....*, p. 3.

games). In the game-theory terms, the definition of coordination problems reads as follows: coordination problems are situations of interdependent decision by two or more agents in which coincidence of interests predominates and in which there are two or more proper coordination equilibria[6]. The complicated, but rational idea of convention lurks form Lewisian account, the main aim of which was to save the intuition of saying that ordinary language is "conventional".

Legal positivists attempt to save the intuition of conventionality of law They are trying to defend the basic Hartian practice theory of rules against the attack of Dworkin. Dworkin, roughly speaking, claimed that legal positivism, which accepts the Social Fact Thesis, cannot simultaneously accept the Normativity Thesis. These theses can be formulated as follows[7]

(NT): "Law is a form of practical reasoning; like morality and prudence, it defines a general framework for practical reasoning. We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting. Thus any adequate general theory of law must give a satisfactory account of the normative (reason-giving) character of law and must relate the framework of practical reasoning defined by law to the framework of morality and prudence".

(SFT): "Law is a social fact; what is and what is not to count as law is a matter of fact about human social behavior and institutions which can be described in terms which do not entail any evaluation of the behavior of the institutions. We understand law only if we understand it as a kind of social institution which can be said to exist only if it is actually in force and directs human behavior in the community. Any adequate general theory of law must give a satisfactory account of law as a social phenomenon".

It seems that potentially these theses are in conflict, and the relationship between them "set the agenda for much of philosophical jurisprudence"[8].

It was G. Postema and J. Coleman who tried to cover the gap between these two theses by applying the notion of Lewisian convention (and similar coordination concepts) to legal theory. Such attempt was clearly understandable, because in *The Concept of Law* Hart openly refers to the idea that law rests, at its foundations, on a special and complex custom or convention[9], but does not present any detailed account of it. The (softly amended) Lewisian definitionof

[6] D. Lewis, *Convention...* , p. 24.The famous Humean situation of the „two men rowing in the boat" is a simple example of coordination problem in Lewisian sense.
[7] G. Postema, *Coordination and Convention at the Foundations of Law*, Journal of Legal Studies, vol. XI (1982), p. 165.
[8] Ibidem.
[9] G. Postema, *Coordination...*, p. 166.

convention, which served for that, could therefore stand as a particular explanation of the phenomenon which Hart had in mind. It is as follows:

"A regularity R in the behavior of persons in a population P in a recurring situation S is as convention if and only if in any instance of S

(1) it is a common knowledge in P that

(a) there is in P general conformity to R;

(b) most members of P expect most members of P to conform to R;

(c) almost every member of P prefers that any individual conform rather than not conform to some regularity of behavior in S, given general conformity to that regularity;

(d) almost every member of P prefers general conformity to some regularity rather than general non-conformity (i.e., general conformity to no regularity);

(2) part of reason why most members of P conform to R in S is that 1a-1d obtain"[10].

The strategy of using such a concept of convention is, however, different from the basic insight of Hart. Postema tries to shift the focus of the doctrine away from regularities of behavior and attitude which, as Hart believed, "constitute" the rule of recognition (socio-legal facts) to the strategic context of practical reasoning, in which such regularities take on normative significance[11]. The concept of Lewisian convention can be used to fuse the NT and the SFT, because, although the presented definition of convention does not contain any normative terms like "ought", "should", "good" and others, and therefore "convention" is itself not a normative term, nevertheless it can be used normatively, since conventions may be species of norms: regularities to which we believe one *ought to* conform[12]. The point is that the conditions indicated in the definition (of both Lewis and Postema) leads to the conclusion that in order to accept the existence of some convention in P we must agree that coordination (general conformity) is significantly valuable to the parties and "were general conformity does not obtain, that fact would provide a significant reason against performing the action in question, a reason which may be sufficient to defeat other independent reasons in favor of performing the action"[13]. Therefore, the coordination problem is supposed to be the central and fundamental problem in the

[10] G. Postema, *Coordination...*, p. 176.
[11] G. Postema..., p. 167.
[12] D. Lewis, *Convention...*, p. 97.
[13] G. Postema, *Coordination...*, p. 178.

conventionalist legal theory.

Such idea has many strengths and vices. It links the idea of law as social fact with the idea of legal normativity. The cost is that it puts the coordination problem in the centre (*de facto* Postema describes three levels of relations between legal officials and laypersons on which coordination problems arise). For the sake of brevity I will skip the detailed description of Postema arguments for central significance of coordination convention. What shall be stressed is that all his efforts to demonstrate the importance of coordination problems advance a claim that the structure or logic of the practical reasoning is implicit in decision-making situations and in the idea that law is characteristically a matter of public rules. It does not mean that every decision is necessarily a solution to some coordination problem, but only that no legal system is conceivable without substantial coordination elements at its foundations[14].

The same substantial element of coordination (or cooperation) in law has been recently addressed by J. Coleman, who committed himself to the idea of M. Bratman's *Shared Cooperative Activity* (SCA). I skip the description of Coleman's insight, because although it is in certain aspects weaker, and in some other stronger than Postema's application of Lewisian definition, the point is that as far as it is a problem of social theory, not of jurisprudence as such, it surely does not affect the general, "hypercommital"[15] anatomy of the coordination approach. Therefore I shall now present another approach, which has been built on the criticism of coordination stance.

A. Marmor believes that we must appeal to a novel kind of convention, a "constitutive convention", in order to accommodate the facts of disagreement and the relevance of appeals to evaluative argument in legal practice[16]. The main function of constitutive conventions is, obviously, to constitute social practices.

The starting point of Marmor's considerations is the distinction, made by J. Searle, between regulative and constitutive rules. According to Searle, "regulative rules regulate antecedently or independently existing forms of behavior; […] constitutive rules do not merely regulate, they create or define new forms of behavior"[17]. Leaving aside some particular difficulties of such distinction, Marmor maintains that Searle's insight "is basically correct and captures something

[14] G. Postema..., p. 194.
[15] M. N.,Smith,*The Law as Social Practice: Are Shared Activities at the Foundations of Law?* Legal Theory 12 (2006).
[16] J. Coleman,*The Practice of Principle*, Oxford 2001, p. 100.
[17] Cf. A. Marmor, *Social Conventions*, Princeton and Oxford 2009, p. 32.

of great importance"[18]. He claims, that if there was a mistake in Searle's account, it was (presumably) to assume that rules constitute particular actions or "new forms of behavior". Thus, Marmor is allowed to develop the Searle's idea in the following way. "Actions are not constituted by rules, but social practices, that is, certain types of *activities*, are. It is only when we have a whole structure of rule-governed activity, with some complexity and interconnections between the rules, we can say that we have a social practice constituted by rules. Constitutive rules are those rules that constitute a type of activity, a social practice"[19]. He differentiates between two basic types of such constitutive rules: (1) social conventions, and (2) institutionally enacted rules.

The model example of a social practice, constituted by rules, which are constitutive conventions, is the game of chess. It would be implausible to think that rules of chess evolved as a solution to any large-scale recurrent coordination problem that had arisen among potential chess players before chess was invented. One may try to structure a very vague and highly general coordination problem: "there we are, wanting to play some structured broad game, and then rules have evolved to solve that problem". Such a coordination problem would be too abstract and underspecified. Not every concerted action a number of agents counts as solution to coordination problem in a relevant sense; otherwise the idea of coordination convention would be deprived of any philosophical significance. Moreover, the essential rationale of the game – all reasons people normally have for playing chess – have very little to do with solving a coordination problem (even if we could tell a story that would explain the emergence of chess as a solution to some vague coordination problem, actual reasons for playing chess would be independent of such a story). "Of course, once the game is there and it is being played, it may give rise to various coordination problems that may get solved by additional rules and conventions. But the essential rationale of the game is ill explained in terms of a solution to a coordination problem. It is true, of course, that in playing any structured game, part of the reason we have to stick to the rules, and be sure that we all know what the rules are, is to make sure that our actions are well coordinated. So yes, undoubtedly there is a coordinative function to any such rule-guided activity, like playing a structured competitive game. But this is one aspect of playing chess, not its main rationale. And it is an aspect that is present in any rule-governed activity, whether conventional or not"[20]. Therefore, the idea of social convention corresponds to the fact that generally conventions evolve as responses to numerous kinds of social needs, they serve a variety of social functions, and

[18] A. Marmor, *Social Conventions*, p. 34.
[19] A. Marmor, *Social Conventions*, pp. 34-35.
[20] A. Marmor, *Social Conventions*, pp. 23-24.

finally – are not all reducible to coordination problems[21]. The function of the constitutive convention constituting chess is "to define what counts as winning and losing game, what are permissible and impermissible moves in the game, and so on"[22].

It is worth noting, that constitutive conventions always have a dual function: the rules both constitute the practice, and, at the same time, they regulate conduct within it[23]. More importantly, as Marmor argues, constitutive conventions typically constitute also some of the values that are inherent in the practice and the kind of evaluative discourse that applies to it (in our exemplary case of chess such values are intellectual skills of strategic computation, memory etc.). "Following constitutive conventions amounts to a type of activity, and it is this activity that has value for those who engage in it (and sometimes others who care about it)"[24]. In particular cases some of these values may make sense only as instances of following the relevant conventions and can be explained only in specific context of the practice constituted by them.

Among many features of constitutive conventions, a few seem to be quite important. Firstly, constitutive conventions come always in system of rules – there is basically no such thing as a single-rule social practice. Coordination conventions do not have this feature; they can be fairly isolated, standing on its own, as it were, without forming part of an interlocking system of norms[25]. Secondly, it is typical of constitutive conventions that we tend to have a very partial knowledge of them. The awareness of constitutive conventions in society is a matter of "a division of labor, taking place in concentric circles; the closer one is to the center, the greater effect one has on what the convention is; and vice versa, of course"[26]. We may be aware that there are particular conventions in our society, but, while standing in the outer circle, our knowledge would be rather partial and in case of such conventions we would rest on experts and better practitioners (the inner circle), whose practice determines and interprets the practice of convention. Marmor roughly notes: "Note that (almost) none of this is expected to obtain in the case of coordination conventions. Coordination conventions are there to solve a particular recurrent coordination problem. Such conventions cannot be expected to solve the coordination problem if most people are largely ignorant about their content"[27]. Thirdly, constitutive

[21] A. Marmor, *Social Conventions*, p. 25.
[22] A. Marmor, *Social Conventions*, p. 36.
[23] Ibidem.
[24] A. Marmor, *Social Conventions*, p. 37.
[25] A. Marmor, *Social Conventions*, p. 45.
[26] A. Marmor, *Social Conventions*, p. 47.
[27] Ibidem.

conventions are typically prone to change over time, and to that extend they differ from coordination conventions. The reasons for change are the core of difference. As we know, coordination conventions are normative solutions to some type of coordination problem. "If the relevant normative solution that has evolved forms a stable equilibrium, then as long as the circumstances remain constant, there would not be any particular pressure of change. If the convention does not constitute a stable equilibrium, a pressure may build up to reach that stage, if circumstances allow. Sometimes, however, the cost of change is higher than its potential gains, and therefore, even if there is a reason to shift to a better convention, that reason may be defeated by the costs that are involved in the change itself"[28]. On the contrary, constitutive conventions have an additional factor that often affects the dynamics of change, namely they are able to constitute "a whole grammar of, *inter alia*, evaluative concerns" that might come to affect the point, content and shape of constitutive conventions themselves. Thus, constitutive conventions tend to be in a constant process of (re)interpretation that is partly affected by external values, but partly by those same values that are constituted by the conventional practice itself[29]. Moreover, since constitutive conventions seem to "constitute some of the values inherent in the relevant practice, those values would normally call for interpretation and reevaluation over time, and this process is likely to bring changes in the constitutive conventions". Due to that fact we might say that constitutive conventions develop gradually, they have a history and that history tends to be socially significant[30].

The rules of chess, which were the major example of constitutive conventions, as it was mentioned, have a dual function: they constitute what the game is, and they prescribe norms that players ought to follow. "Similarly, Hart has claimed, the rules of recognition define or constitute what law in a certain society is, and they prescribe (that is, authorize) modes of creating/modifying law in that society. Social rules can determine their ought, as were, by being followed (viz. regarded as binding) by a certain community, just as the rules of chess determine their «ought» within the game that is actually followed by the relevant community"[31].

The RR is the rule, which makes judges able to see themselves as institutional players, playing, as it were, a fairly structured role in an elaborate practice. Moreover, in original Harts account the main rationale of the RR consists in the need for certainty (what allowed him to

[28] A. Marmor, *Social Conventions*, p. 48.
[29] A. Marmor, *Social Conventions*, p. 48.
[30] A. Marmor, *Social Conventions*, pp. 49-50.
[31] A. Marmor, *Social Conventions*, pp.160-161; cf. H.L. A. Hart, *The Concept of Law*, Oxford 1994, ch. 5.

distinguish between "primitive" and "developed" legal systems). In the *Postscript* Hart adds another kind of reason for having the RR, basically of coordinative nature: "Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial custom. That it does so rest seems quite clear at least in English and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues in this as their predecessors have done"[32] Marmor contests both kinds of rationale presented by Hart (and accepted by Postema and Coleman). Although the certainty about what counts as law in our society certainly exists, it is doubtful to treat such reason as the main one. It is so, because there must be some reasons for having law first, and then, as he argues, it might also be important to have a certain level of certainty about it. Marmor claims that "the reasons for having rules of recognition are closely tied to the reasons for having law, and in some ways (yet to be specified), they instantiate these reasons"[33]. On the other hand, although it is true that officials need a great deal of coordination in various respects (especially, in following basically the same rules that other officials follow in identifying the relevant sources of law), it is necessary first to identify them as judges. Therefore we first need a set of rules that constitute their specific institutional roles. "In short, and more generally, first we need the institutions of law, then we may also have some coordination problems that may require the normative solution. The basic role of the rules of recognition is to constitute the relevant institutions"[34]. If it is so, the fundamental RR of a legal system must be constitutive convention (or, more precisely, a systematic complex of constitutive conventions). In opposition to Postema, Coleman and many other legal theorist, Marmor denies that the main rationale of law itself is of coordinative nature (it may be only its minor function). Marmor, citing the work of L. Green[35] claims that "the idea that law's main functions in society can be reduced to solution of coordination problems is all too

[32] H.L. A. Hart, *The Concept of Law*, p. 267; cf. A. Marmor, *Social Conventions*, p. 164.
[33] A. Marmor, *Social Conventions*, p. 165.
[34] Ibidem.
[35] The key point in Green's critique of treating coordination convention as a foundational convention is that it is mistaken from a conceptual point of view. Coordination conventions evolve as conditional solutions to coordination problems. On the contrary, law's claim to authority is always unconditional and cannot be conceptually connected with a salient solution to any antecedent coordination problem. The ability to solove such problem may be only a part of explanation of legitimacy of that claim (it is empirical question if it does), but it does not explain the fact that law always makes such unconditional claims in matters in which it purports to guide behavior. The fact is that in spite of promoting coordination in many cases law also obstructs coordination – and it still does it with all the authority it claims (cf. L. Green, *Positivism and Conventionalism,* Canadian Journal of Law and Jurisprudence, vol. XII, nr 1 (1999); L. Green, *The Authority of the State*, Oxford 1988).

easy to refute"[36], supposing that his conception stands firmly against all possible critique.

The critique of Marmor's stance refers to his account of internal and external legal obligations[37]. Even for Marmor it is clear that the primary reasons, on which judges are supposed to act, are not the auxiliary reasons (internal obligations), but are of squarely "external" kind. The reasons founding external obligations of adherence to the RR are therefore not legal reasons. According to Hart, the common official practice (the social fact) is – what has been recently plausibly reminded by J. Dickson[38] – properly understood as a necessary existence condition of the rule of recognition (henceforth "RR"), and as playing an identifying role with regard to it. It does not, however, necessarily commit one to the view that the RR is a conventional rule, in the sense that such practice, being its existence condition, *also* necessarily supplies judges (and other participants in practice) with reasons why they *ought to* accept and follow that rule (that is - external reasons)[39]. It is worth reminding that, even in case of original account of Lewis, a convention was supposed to be normative only in context of "internal" obligation, insofar as the need of "external" justification was replaced by the factual appearance of a recurring coordination problem and some practical need of solving it.

As we know, the RR is the ultimate validity condition of first-order legal norms, but itself it is a social rule, which is not valid in legal sense. It is constituted by the common practice of officials. Such practice may have some constitutive features, like these described by Marmor. Therefore, although we could call such a practice "constitutive", due to the fact it is "constituting" the rules of "the legal game", actually it "cannot settle for the judge, or anyone else for that matter, whether they should play by the rules of law or not"[40]. Such rule, having constituted the framework of the game, can only "tell judges what the law is" (it is an identifying role of the RR), but not why they ought to apply it.

Dickson is right, when characterizing Marmor's account in this way: "Marmor seems to contend that the existence of a rule of recognition, understood as a constitutive convention, does not answer the question of what underlying primary reasons judges have for «playing the legal game» and for accepting the rules of their legal system, including the rule of recognition, as

[36] A. Marmor, *Social Conventions*, p. 166.
[37] For the meaning of the concepts of „internal" and „external" normativity see B. Williams, *Internal and External Reasons* [in:] *Moral Luck*, Cambridge 1981.
[38] J. Dickson, *Is the Rule of Recognition Really a Conventional Rule?* Oxford Journal of Legal Studies, vol. 27, no. 3 (2007).
[39] J. Dickson, *Is the Rule...*, p. 396.
[40] A. Marmor, *Social Conventions*, p. 22.

binding"[41]. She accurately finds Marmor as suggesting that, if assumed that judges have underlying (external) reasons of whatever kind to play "the legal game" and accept and follow the RR, constitutive conventions define what the RR of a given system is, and hence define what is recognized as law in a given society[42].

It is now clear that even for Marmor, the RR is not the reason-giving rule in the sense that it being practiced by almost all officials is a reason for others to follow it too (that would be some kind of "strong dependency condition"). The question that arises is: why shall we call such a rule a "convention"? Dickson says that Marmor's implementation of the conventionalist terminology is redundant. The RR is a social rule, because the practice of officials is necessary for it to come into and be sustained in existence. It neither justifies a legal authority, nor describe the character of political obligation in order to answer questions whether and under what conditions judges ought to accept it as binding and follow it in their legal system. But yet, using the terminology of conventionalism "may seem to indicate a role for common official practice going beyond this, and may lead some erroneously to believe that the account in question is designed to explain the reasons why judges should accept as binding and adhere to the rule of recognition, and that the explanation is largely to be found in the fact that their fellow judges behave in a certain way in common"[43]. The terminological ambiguity in such case may surely lead to many misunderstandings. It is important argument, because it refers to every account of conventionality (both coordinative and constitutive). But why should the "mere conventionality" be ascribed only to reason-giving practices? The plausible answer is: otherwise every rule would be "conventional", and such an account would be of no philosophical and practical interest. It would be actually the anticonventionalist critique of Quine evoked once again, but in "conventionalist disguise". There would be no practical difference in saying "If you really want to play chess – play chess" or "If you really want to obey law – obey it" and "If you really want to take a bath, take it" and so on, and thus, the external reason would be the mere willingness (a "normative in" or basic "normative hunch") of taking part in such a game or activity. In such account the game of chess would be conventional as every other human action (both giving or not giving any reasons itself), what would be absurd.

Consequently, the link between the SFT and NT was too hastily established, and both theses should be pulled away. The basic thesis is still the normativity thesis, espoused in Dworkinean

[41] J. Dickson, *Is the Rule...*, p. 398.
[42] J. Dickson, *Is the Rule...*, p. 398.
[43] J. Dickson, *Is the Rule....*, p. 402.

critique of Hartian social rule. But accepting this we need not to embrace the Dworkinean account of legal validity – we can still, as e.g. J. Raz does, accept the social fact thesis as a proper criterion for identification of valid law, without accepting the RR as reason giving rule *per se*. It is true, that from the perspective of methodological positivism (explicated in the original Hart's account of the RR), the RR cannot be conceived as conventional, reason-giving rule. The proper account of such reasons should be provided by the normative or political jurisprudence, analyzing extra-legal reasons for obeying law.

Moreover, there is significant tip in original account of Searle[44], while he introduces the discrimination between regulative and constitutive rules. It is explicitly denied there that constitutive rules can be conventions. He writes: "The claim I made was, institutional facts exist only within systems of constitutive rules. The systems of rules create the possibility of facts of this type; and specific instances of institutional facts, such as the fact that I won at chess or the fact that Clinton is president are created by the application of specific rules, rules for checkmate or for electing and swearing in presidents, for example. It is perhaps important to emphasize that I am discussing *rules* and not *conventions*. It is a rule of chess that we win the game by checkmating the king. It is a convention of chess that the king is larger than a pawn. «Convention» implies arbitrariness, but constitutive rules in general are not in that sense arbitrary"[45]. Searle is clear that the institutional facts have some kind of self-referential and holistic normative force, which cannot be connected conceptually with basically arbitrary notion of "convention".

Marmor treats this remark of Searle as groundless[46]. For me it seems to be crucial. It leads us to the conclusion that there are many different kinds of rules, which can give rise to legal institutions. But conventions need not only be normative, but also – arbitrary (at least to some extent, which is to be defined after Quine-Lewis debate, and not gradable in many degrees of conventionality, as Marmor suggests). Of course, it would be therefore right to say that American or English rules of recognition are conventional, referring to their particular features, but on the grounds of general jurisprudence it is still not justified. Likewise is the claim, that the RR is conventional in the sense of being duty-imposing rule. If it is nevertheless uneasy to explain both normativity and arbitrariness of conventions, yet having enough reasons to explain the RR as a "constitutive rule", it would be much more beneficial to abandon the

[44] J. Searle, *The Construction of Social Reality*, New York 1995.
[45] J. Searle, *The Construction...*, p. 28.
[46] A. Marmor, *Social Conventions*, p. 35, note 8.

"conventionalist" conceptual framework (along with its, to some extent misleading, terminology).

Yet, the question what the RR really is remains still the most interesting question posed by contemporary legal positivism. I doubt whether RR is a duty-imposing rule. After all, there are no substantive reasons, for which we would need such a rule. Therefore "the Strong Conventionality Thesis" (stating that RR is a duty-imposing rule) being an affirmative reply to "the Conventionality Puzzle" must be abandoned. Still, there is no need of abandoning "the Weak Conventionality Thesis", which addresses only the crucial role for common official practice in legal theory. But, as Dickson noticed, such an account of conventionality is of no practical interest, as far as it is a mislabeled formulation of classical SFT.

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